

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALAN GREEN,

Defendant-Appellant.

UNPUBLISHED

January 27, 2004

No. 242832

Iosco Circuit Court

LC No. 01-004288-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALAN GREEN,

Defendant-Appellant.

No. 248240

Iosco Circuit Court

LC No. 01-004288-FH

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from jury convictions for burning of a dwelling house, MCL 750.72, and burning of insured property, MCL 750.75. We reverse and remand for an evidentiary hearing based on newly discovered evidence.

Defendant first argues that the trial court abused its discretion in denying his motion for an evidentiary hearing based on newly discovered evidence. We agree. A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987).

“For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: ‘(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial.’” *People v Cress*, 468 Mich 678, 692; 664

NW2d 174 (2003), citing *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); see, also, MCR 6.508(D).

Here, the evidence at issue is codefendant Barbara Jo Gilbertson's post-conviction letter to her attorney in which she confessed to starting the fire with a candle. In her letter, Gilbertson – defendant's live-in girlfriend – stated that she started the fire out of frustration that defendant would not move closer to Gilbertson's family. According to Gilbertson's letter, defendant did not know she started the fire until the day before she wrote the letter. Accepting the truth of Gilbertson's statement, this evidence satisfies the four-part test. Although "it is within the trial court's discretion to determine the credibility of the confessor," *Cress, supra* at 692, the trial court did not assess Gilbertson's credibility or apply the four-part test. The failure to do so under these circumstances constitutes an abuse of discretion. Therefore, we remand for an evidentiary hearing on the basis of newly discovered evidence.

Next, defendant argues that he was denied effective assistance of counsel. In the alternative, he argues that counsel's errors at trial and the trial court's holding on defendant's post-conviction motion for an evidentiary hearing amounted to reversible cumulative error. We disagree with both arguments.

To demonstrate ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). The defendant also has to show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 Mich App 294 (2001). The defendant bears the burden of overcoming the strong presumption of effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002), citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). And, an attorney's decisions regarding strategic matters – including whether to call witnesses – are given deference by this Court. *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant contends that his attorney failed to render effective assistance because he did not introduce testimony from an arson expert. This Court finds that defendant fails to overcome the presumption that counsel's performance met the objective standard of reasonableness. Defendant's attorney subjected the prosecution's experts – who both concluded that the fire was started using accelerants – to vigorous cross-examination. The prosecution's case against defendant was wholly circumstantial, and the prosecution experts' testimony did not implicate defendant and Gilbertson as the perpetrators. In light of these facts, the value of a defense expert's testimony is entirely speculative. Therefore, we cannot find that defense counsel's performance rendered the trial fundamentally unfair or unreliable. There was no error, therefore, defendant's cumulative effect of errors claim, which only references this issue, is without merit. See *LeBlanc, supra* at 591-592.

Because we remand for an evidentiary hearing on the issue of newly discovered evidence, we need not consider defendant's challenge to his sentence. However, because the sentence is within the statutory guidelines, and there was no allegation of error in scoring or inaccurate information, the sentence must be affirmed. See MCL 769.34(10)

Reversed and remanded for an evidentiary hearing on the issue of newly discovered evidence. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Mark J. Cavanagh

/s/ Jessica R. Cooper